IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

SA.No. 479 of 1994()

AS.27/1990 of SUB COURT, PAYYANNUR
OS.168/1986 of MUNSIFF COURT, THALIPARAMBA
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APPELLANTS: APPELLANTS/ SUPPL. PLAINTIFFS 2 TO 7
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1. **EDACHERIAN SALEEMA, W/O. YAKOB, (DECEASED), RESIDING AT MADAI AMSOM, PUTHIYANGADI DESOM IN CANNANORE TALUK.**

2. **SUKUMARAN, S/O. LATE YAKOB, DO. DO.**

3. **BIATREES, D/O. LATE YAKOB,. DO. DO.**

4. **MARTHA, D/O. LATE YAKOB, DO. DO.**

5. **PHILIP , S/O. LATE YAKOB, DO. DO.**

6. **MEERABAI, D/O. LATE YAKOB, DO. DO.**

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SMT.VANAJA MADHAVAN

RESPONDENTS: RESPONDENTS 2 TO 6 AND LEGAL REPRESENTATIVES
---------- **OF D1.**

*1 **LISSY, W/O. LATE EDACHERIAN POULOSE, RESIDING AT MADAI AMSOM, PUTHIYANGADI DESOM, CANNANORE TALUK. (DIED)**

2. **EDLEN BELINDA PADMABAI @ E.LINDAMMA LASSOR, D/O. LATE EDACHERIAN POULOSE, DO. DO. lR. OF R1.**

3. **PAVITHRAN POULOSE, S/O. LATE EDACHERIAN POULOSE, DO. DO. LR OF R1.**

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4. E.MANNUAL POULOSE , S/O. DO. DO. LR OF R1.

5. BIATRIS SATHYAVATHI, D/O. DO. DO. LR OF R1.

*** RESPONDENTS 2 TO 5 ARE RECORDED AS THE LEGAL HEIRS OF R1 VIDE ORDER DT. 11.7.06 ON MEMO BEARING C.F. 9034/05.**

BY ADV. SRI.M.A.MANHU
SRI.M.A.FAYAZ

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 479 OF 1994

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DATED THIS THE 26th DAY OF SEPTEMBER, 2007

JUDGMENT

Plaintiffs in O.S.168 of 1986 on the file of Munsiff Court, Taliparamba are the appellants. Defendants are respondents. The dispute in the appeal had a chequered career. Contending that the deceased first plaintiff has been in possession of the property and deceased defendant was attempting to trespass into the plaint schedule property, Yacoob Edacheriyan, the original plaintiff filed O.S.242 of 1976 before Munsiff Court, Taliparamba. Edacheriyan Paulose, the defendant contended that he is in possession of the property as a tenant. Though plaintiff claimed title under Ext.A3 assignment deed, the title was disputed. Under Ext.A6 judgment, trial court dismissed the suit. Though an issue regarding title was framed, trial court did not enter a finding on title for the reason that the suit is only one for injunction. Plaintiff challenged the decree and judgment before Sub Court, Thalassery in A.S.61 of 1978. Learned Sub Judge found that as the dispute also involves the identity of the property, the question of title is also to be decided. Learned Sub Judge, on the basis of boundaries shown in Ext.A3 (which was

Ext.A1in that suit), found that plaintiff has title and accepting the case of possession, granted the decree. Defendant challenged Ext.A8 judgment in the first appeal before this court in S.A.806 of 1979. This court, under Ext.A9 judgment, set aside Ext.A8 judgment and held that plaintiff did not establish his title or possession and dismissed the suit. O.S.168 of 1986 was thereafter filed by the same plaintiff seeking a decree for declaration of title and possession and consequential relief of permanent prohibitory injunction. Plaintif contended that plaint schedule property originally belonged to Basel Mission Society on Kuzhikanam right and jenmom right vest with Thiruvarkatt Kavu devaswom and from the Basel Mission, George Thekkan obtained the property on oral lease and while he has been in possession, plaintiff purchased the property under Ext.A3 sale deed from George Thekkan on 17.5.1956 and later he purchased jenmom right from the Land Tribunal as per order in O.A.10140/1976 and obtained Ext.A5 purchase certificate and has been in possession of the same and though O.S.242 of 1976 filed by him earlier was dismissed for his failure to prove possession, as plaintiff has title to the property, he is entitled to a decree for declaration of his title as well as possession and also

a permanent prohibitory injunction.

2. Defendant, in his written statement contended that the lease set up by the plaintiff is false and George Thekkan, the assignee under Ext.A3 did not have possession of the plaint schedule property and the purchase certificate obtained by appellant does not relate to the plaint schedule property and the suit is barred by resjudicata under Section 11 of Code of Civil Procedure, in view of dismissal of O.S.242 of 1976 and therefore plaintiff is not entitled to the decree sought for.

3. Learned Munsiff, on the evidence of PWs 1 to 4, Dws 1 to 4, Exts.A1 to A19, Exts.B1 to B10 and Exts.X1 to X1(e) dismissed the suit holding that claim of the plaintiff is barred by resjudicata in view of the judgment of the High Court in O.S.242 of 1976 as the question of title and possession was considered and decided in that suit. On the death of original plaintiff, appellants, his legal heirs were impleaded as additional plaintiffs before the trial court. They filed A.S.27 of 1990 before Sub Court, Payyannur challenging the decree and judgment. First appellate court, on reappreciation of evidence, found that under Ext.A6 judgment, trial court though framed an issue on title, did not decide the issue and first appellate court under Ext.A8,

decided the issue on title also but under Ext.A9 judgment, High Court only considered the question of possession and not title and therefore suit for declaration of title as such is not barred by resjudicata. But it was found that possession set up in the plaint was the same possession which was asserted in O.S.242 of 1976 and in view of Ext.A9 judgment on the question of possession is barred by resjudicata and therefore appellant is not entitled to a decree for declaration of possession. Learned Sub Judge found that in the light of the finding in Ext.A9 that original plaintiff was not in possession of the property on the date of that suit without seeking a consequential relief of recovery of possession as provided under Section 34 of the Specific Relief Act, appellant is not entitled to a declaration of title alone. The appeal was dismissed. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law.

1)Whether the decision evidenced by Ext.A9 operate as resjudicata ?

2)Whether the decision evidenced by Ext.A17 controls the right of the parties and constitutes resjudicata ?

3)Whether appellants are entitled to pray for amendment of

plaint, on the facts and circumstances of the case ?

5. Learned Senior counsel appearing for the appellants and learned counsel appearing for respondents were heard. Learned Senior counsel argued that finding of first appellate court is that the suit for declaration of title is not barred by resjudicata as the issue on title was not decided in the previous suit. It was vehemently argued that the dispute between the parties was finally settled under Ext.A17 decision of this court in CRP 1537/1986 dated 17.10.1988 and therefore under Ext.A3, appellants have title to the plaint schedule property. It was argued that as respondents could only claim kudikidappu right, they cannot dispute the title and possession of the plaintiff over the remaining extent of the plaint schedule property and therefore courts below should have granted the decree for declaration of title and possession. Relying on the decision of this court in **Lakshmi Ammal and another V. Kittu and others** (1958 KLJ 232), it was argued that possession of the property by a kudikidappukaran can only be for and on behalf of the landlord and in the light of Ext.A17 and the order of Land Tribunal granting kudikidappu certificate under Section 80(B) of the Kerala Land Reforms Act to the defendant, he can only only have

right and possession over the kudikidappu and as appellants have title to the property under Ext.A3, a decree as sought for should have been granted.

6. Learned counsel appearing for respondents argued that under Ext.A9 judgment, it was held that under Ext.A3, possession cannot be presumed with the plaintiff as it was found that Basel Mission Society, who admittedly had kuzhikanam right over the property, was in the habit of granting indiscriminate oral lease and unless it is proved that under the oral lease alleged, the assignor of appellants under Ext.A3, obtained possession, appellants cannot claim possession of the property at all. It was also argued that under Ext.A9 judgment, this court found that the property asserted by plaintiffs in the earlier suit is not the plaint schedule property but another property and unless there is evidence to prove that plaint schedule property was obtained under Ext.A3, title cannot be claimed by appellants under Ext.A3 and in any case when this court, under Ext.A9 found that appellants were not in possession of the property and appellants have no case that subsequent to the disposal of Ext.A9 judgment, they obtained possession of the property, they are not entitled to a declaration that they are in

possession of the property and as rightly found by courts below, when consequential relief as provided under Section 34 of the Specific Relief Act was not claimed, appellants are not entitled to a decree for declaration of title alone, when they are not in possession of the property and therefore the appeal is only to be dismissed.

7. The trumpcard of the appellant is Ext.A17 order of this court in CRP 1537/1986. It was argued that the deceased defendant claimed tenancy right over the plaint schedule property having an extent of 25 cents in SM 2680 of 1977 before the Land Tribunal and this court as per Ext.A17 order found that as kudikidappu was granted to the defendant under Section 80 (B) of Kerala Land Reforms Act in respect of 10 cents of the property, defendant is not entitled to claim tenancy right over the additional extent of the 25 cents and claim for tenancy raised by defendant in SM 2680/1977 was finally disallowed. It is based on the finding in Ext.A17 order, learned senior counsel argued that defendant cannot claim to be in possession of the plaint schedule property except the land covered under the kudikidappu. The argument could have been accepted if defendant had claimed either kudikidappu or tenancy right

under the plaintiff who was the fourth respondent in CRP 1537 of 1986. Ext.A17 is the order in CRP 1537/1986. The CRP was filed against Ext.A12 order in A.A.5417 of 1978 of Appellate Authority(Land Reforms). Ext.A12 order establish that defendant did not claim tenancy under the plaintiff. On the otherhand, tenancy was claimed under an oral lease from Basel Mission, the intermediary in the Land Tribunal proceedings contending that jenmom right vests with Devaswom. Plaintiff, 4th respondent in the CRP, got himself impleaded claiming that he has right over the property. Therefore Ext.A17 order will not enable the appellant to claim that defendant was the tenant or kudikidappukaran under the plaintiff. If that be so, the decision of this court in Lakshmi Ammal's case (supra) cannot help appellants to contend that possession of the defendant can only be for and on behalf of plaintiff. Ext.A17 does not resolve the dispute of claim for title raised by the plaintiff. In fact Ext.A17 did not consider the question whether plaintiff has any right or title to the property. The only question considered was whether defendant who was permitted to purchase kudikidappu right can also claim tenancy right. Hence the dispute in the appeal cannot be resolved on the basis of Ext.A17 order.

8. Even if it is taken that there is no specific finding in Ext.A9 judgment on the question of title, a reading of Ext.A9 establish that question whether plaint schedule property is part of the property covered under Ext.A3, was considered by this court. This court found that report of the Commissioner shows that the disputed property is in R.S.197/5 known as Padappapadichal and the property claimed by plaintiff under Ext.A3 is 25 cents in R.S.197/6 described as Kadappuram Chalepparambu Ittamana Paramba. It was found that none of the documents produced by the plaintiff show that plaintiff has been in possession of land in R.S.197/5 and plaintiff was asserting right and possession only over the property in R.S.197/6. In the light of this finding, it is futile for appelalnts to contend that they have title to the plaint schedule property under Ext.A3, unless it is established that property in R.S.197/6 conveyed under Ext.A3 is the property in R.S.197/5. Moreover, when this court in Ext.A9 judgment specifically found that even if it is taken that plaint schedule property is covered under Ext.A3, unless it is proved that possession was obtained from Basel Mission Society by the assignor of the plaintiff, appellants cannot claim possession over the property without proving the

possession of the assignor under Ext.A3. It was held that in the nature of the case, presumption that possession follows title will not arise in the case. Therefore appellants cannot get a decree on the basis that they have title to the property, unless it is established that they have obtained possession of the property. Moreover when under Ext.A9 judgment in S.A.806 of 1979, this court found that plaintiff was not in possession of the property as on the date of institution of O.S.242 of 1976, it is futile for appellants to seek a decree for declaration of possession. As rightly found by courts below, the finding in Ext.A9 judgment with regard to possession would definitely operate as bar for the plaintiffs from seeking such a relief. If that be the case, appellants are not entitled to any of the reliefs sought for.

9. Learned senior counsel finally submitted that an opportunity may be granted to the appellants to institute a fresh suit for recovery of possession on the strength of title. In the nature of facts and history of the case, I do not find that it is in the interest of justice to grant any such liberty. In spite of the fact that this court found that plaintiff was not in possession of the property in 1976, when O.S.242 of 1976 was filed, plaintiff did not seek a decree for recovery of possession and the

subsequent suit was instituted seeking a decree for declaration of possession. Even if it is taken that possession of defendant till then is not adverse, the subsequent possession must necessarily be adverse and the claim for recovery of possession would definitely be barred by this time. In such circumstances, liberty sought for cannot be granted.

Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR, JUDGE

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